

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34807

STATE OF IDAHO,)	2009 Unpublished Opinion No. 401
)	
Plaintiff-Respondent,)	Filed: March 30, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
MIGUEL ANGEL PALOMO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Minidoka County. Hon. John M. Melanson, District Judge.

Appeal from order revoking probation, dismissed; appeal from order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

Before LANSING, Chief Judge; PERRY, Judge;
and GRATTON, Judge

PER CURIAM

Miguel Angel Palomo pled guilty to possession of a controlled substance, marijuana, with intent to deliver. I.C. § 37-2732(a)(1)(B). The district court imposed a unified sentence of five years with a determinate term of two years, suspended the sentence and placed Palomo on probation. The judgment was entered on March 1, 2006.¹ Subsequently, Palomo was found to have violated several terms of the probation, and the district court consequently revoked probation, ordered execution of the original sentence and retained jurisdiction. Following the period of retained jurisdiction, the district court suspended the sentence and again

¹ An amended judgment, to correct a clerical error, was filed on March 6, 2006.

placed Palomo on probation. Thereafter, Palomo was again found to have violated several terms of probation and, on August 6, 2007,² the district court revoked his probation and ordered the underlying sentence executed. On August 16, 2007, Palomo filed a Rule 35 motion, which was denied on November 2, 2007. Palomo filed this appeal on November 26, 2007, contending that the district court abused its discretion by revoking probation and executing the underlying sentence and by denying his Rule 35 motion.

Idaho Appellate Rule 14 requires that the notice of appeal be filed “within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil or criminal action.” The notice of appeal was filed on November 26, 2007, more than forty-two days after the filing of the order revoking probation on August 6, 2007. We also note that Palomo’s Rule 35 motion did not extend the time for filing an appeal. A Rule 35 motion could terminate the running of the time for filing an appeal until the motion is decided, but only if the motion is filed within fourteen days of the judgment. I.A.R. 14(a). As noted, the judgment was entered on March 1, 2006. Palomo’s Rule 35 motion, filed on August 16, 2007, was not filed within fourteen days of the judgment. An order revoking probation is not a judgment. It is an “order made after judgment affecting the substantial rights of the defendant,” which may be appealed as a matter of right under I.A.R. 11(c)(9). *State v. Thomas*, 146 Idaho 592, 594, 199 P.3d 769, 771 (2008). The filing of a timely notice of appeal is jurisdictional. *Id.*; I.A.R. 21. Because the appeal was taken untimely with respect to the order revoking probation, we are without jurisdiction to review the merits of that order.

However, with regard to the order denying Palomo’s Rule 35 motion, the appeal was timely. Consequently, we have jurisdiction to review the denial of Palomo’s Rule 35 motion. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Upon review of the record, including

² An amended order, to correct a clerical error, was filed on August 9, 2007.

the new information submitted with Palomo's Rule 35 motion, we conclude no abuse of discretion has been shown.

We do not have jurisdiction to review the revocation of Palomo's probation because he did not timely file a notice of appeal from that order. Therefore, that appeal is dismissed. The district court's order denying Palomo's Rule 35 motion is affirmed.